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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY MARVIN JOHNSON,

Defendant and Appellant.

2d Crim. No. B213137
(Super. Ct. No. F417785)
(San Luis Obispo County)

Kelly Marvin Johnson appeals the judgment entered after a jury convicted him of involuntary manslaughter (Pen. Code, § 192, subd. (b)). The trial court sentenced him to three years in state prison. He challenges the sufficiency of the evidence supporting his conviction and raises various claims of instructional error. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 14, 2008, appellant, David Cartwright, James Proffer, and victim Patricia Kalbskopf spent the day drinking alcohol at the beach. When the highly intoxicated Kalbskopf fell asleep, appellant, Cartwright, and Proffer covered her with sand. Kalkbskopf inhaled sand through her nose and died from asphyxiation. After the three men realized she was dead, they smoothed out the pile of sand they had created near her body and packed up her belongings. The men prepared to drive away, then decided to stay and call 911.

When the police arrived, appellant said that they had tried to awaken Kalbskopf about an hour after she went to sleep and that he spent 20 minutes performing CPR on her. Although appellant failed to mention they had covered her in sand, the responding officer observed "large amounts of sand" on her face and in her mouth. When appellant was questioned later that night, he stated that he, Cartwright, and Proffer had "buried" Kalbskopf in the sand. He claimed, however, that she got up afterward and drank more alcohol before she decided to lie down and take a nap.

When appellant was interviewed the following day, he said Kalbskopf was "halfway passed out" when they threw sand on her but "we didn't throw a ton [of sand] on her" and she "wasn't covered up." When they tried to wake her up, her lips were blue and they realized she was dead. The three men got into appellant's car and planned to drive away, then decided to stay.

Jonathan Andrews was vacationing on the beach when he saw appellant, Cartwright, and Proffer appear to be making a pile of sand that was approximately two feet high and five feet long. When the paramedics arrived, Andrews walked over and saw that Kalbskopf's "nose was packed with sand." He also noticed that the pile of sand had been smoothed out. The jury was shown photographs Andrews took that night that depicted the mound of sand in the background.

Kalbskopf had a .40 blood alcohol level at the time of her death. Dr. Gary Walker, who performed the autopsy on Kalbskopf, testified that she had inhaled enough sand to "completely close[]" her left lung and to close off 60 percent of her right lung. He opined that such a result could only have been achieved by placing a "continuous supply of sand" on her head. He also opined it would have been impossible for her to stand up and drink alcohol after she was buried because she would have been unable to breathe.

Appellant testified that he, Cartwright, and Proffer had put sand on Kalbskopf, although he claimed none of them poured sand on her face. He said they were merely "playing" and stopped putting sand on Kalbskopf when she told them to. Kalbskopf then got up and had a drink before she lay down and went back to sleep. After

awhile, Cartwright said something was wrong. Appellant attempted to perform CPR on Kalbskopf, but she was already dead. Cartwright suggested they leave. They packed up and got inside appellant's car, then he decided they should stay and call 911. He acknowledged they had created a small mound of sand, although he did not know what had happened to it.

DISCUSSION

I.

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support his conviction. Specifically, he claims there was no substantial evidence that he either perpetrated the crime or aided and abetted its commission.

In reviewing claims of insufficient evidence, "" . . . we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]"" [Citation.] ' . . . [W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) The same standard of review applies in cases in which the prosecution relies on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."" [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) ""Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." [Citation.]" (*Id.* at p. 933; *Stanley, supra*, at p. 792.)

Involuntary manslaughter is defined as the unlawful killing of a human being without malice that occurs in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (§ 192, subd. (b); *People v. Halvorsen* (2007) 42 Cal.4th 379, 415.) Appellant was convicted of the involuntary manslaughter of Kalbskopf on the theory that he either perpetrated the crime or aided and abetted its commission. "Both aiders and abettors and direct perpetrators are principals in the commission of a crime. . . . '[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator.' [Citation.]" (*People v. Calhoun* (2007) 40 Cal.4th 398, 402.)

The evidence is sufficient to support appellant's conviction for involuntary manslaughter as either a perpetrator or an aider and abettor. As the People note, his claim to the contrary is largely premised on the erroneous assumption that the prosecution had to prove the identity of the perpetrator. (See, e.g., *People v. Hoang* (2006) 145 Cal.App.4th 264, 274-276.) He also erroneously suggests the prosecution had to prove "whose sand" actually caused Kalbskopf's death in order for the jury to find him liable as either a perpetrator or an aider and abettor. That is simply not the law. (*People v. Calhoun, supra*, 40 Cal.4th at p. 402.) Moreover, the jury did not have to unanimously agree whether appellant was liable as a perpetrator or an aider and abettor. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1026.)

By appellant's own admission, he participated in "burying" Kalbskopf in sand as she slept on the beach. An eyewitness testified to observing all three men creating a two-foot high and five-foot long mound of sand. When the paramedics arrived, Kalbskopf's nostrils were filled with sand and she was dead from asphyxiation. One of the police officers who responded to the scene observed "large amounts of sand" on her face and in her mouth. The doctor who performed the autopsy on her testified that

she had inhaled enough sand to close off her left lung and that someone must have poured a "continuous supply of sand" on her head. Appellant's lengthy argument that this evidence is not enough to sustain his conviction flatly ignores both the applicable standard of review and the very concept of circumstantial evidence.

II.

Instructional Error

A.

Failure to Give CALCRIM No. 240

In his opening brief, appellant contends the court violated its sua sponte duty to instruct the jury on causation pursuant to CALCRIM No. 240. In his reply brief, he concedes that the jury was given CALCRIM No. 581, which incorporates the entirety of CALCRIM No. 240.¹

B.

CALCRIM No. 401

Appellant asserts the court erred in failing to modify the language of CALCRIM No. 401, which instructed the jury on aiding and abetting.² He claims the instruction erroneously informed the jury that in order to find him guilty as an aider and

¹ CALCRIM No. 581 provides in pertinent part: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death."

² The instruction provided in pertinent part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

abettor it had to find that the perpetrator "intended" to commit the target crime, because he was charged with the unintentional crime of involuntary manslaughter. He contends that he was prejudiced by the instruction's misleading reference to an intentional crime because "[i]t put before the jurors the suggestion that they were being called upon to decide a case that potentially involved an *intentional* killing. But under the prosecution's own theory of the case, there was no question of there having been an intentional homicide. There was not the slightest evidence to support that. And [appellant] was not charged in connection with an intentional killing."

Because appellant essentially complains that a legally correct instruction was misleading under the facts of his case and he did not request modification or clarification below, his claim is forfeited. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) In any event, it lacks merit. Appellant ironically complains that the instruction may have made it *more difficult* for the jury to convict him. Moreover, another instruction made it clear the jury was to determine (1) whether appellant aided and abetted the perpetrator's intentional commission of either a "Simple Battery that posed a risk of death or serious bodily injury" or a "lawful act done in a criminally negligent manner," and (2) whether a reasonable person in appellant's position would have known that involuntary manslaughter would be a natural and probable consequence of either act.³ In light of these instructions, no reasonable juror would have interpreted

³ The jury was instructed pursuant to CALCRIM No. 403 as follows: "Before you may decide whether the defendant is guilty of Involuntary Manslaughter, you must decide whether he is guilty of committing Simple Battery that posed a high risk of death or great bodily injury because of the way in which it was committed, or whether the defendant is guilty of Involuntary Manslaughter because he aided or abetted coparticipants Mr. Proffer and Mr. Cartwright in the commission of such crime. [¶] Alternatively, before you decide whether the defendant is guilty of Involuntary Manslaughter, you must decide if the defendant did a lawful act in a criminal[ly] negligent manner, or aided [and] abetted coparticipants Mr. Proffer, and Mr. Cartwright in a lawful act done in a criminally negligent manner. To prove that the defendant is guilty of Involuntary Manslaughter, the People must prove that: [¶] 1. The defendant is guilty of either committing a Simple Battery that posed a risk of death or serious bodily injury; or [¶] 2. The defendant aided and abetted coparticipants Mr. Proffer and Mr. Cartwright in the commission of a Simple

the challenged instruction as requiring a finding that the perpetrator intended to kill the victim.⁴

C.

Flight - CALCRIM No. 372

Over appellant's objection, the court instructed the jury on flight in accordance with CALCRIM No. 372.⁵ Appellant contends the court erred in giving the instruction and that he was prejudiced thereby because there was no evidence from which the jury could have found that he ever attempted to flee from the crime. We disagree.

Battery that posed a risk of death or great bodily injury; or [¶] 3. The defendant did a lawful act in a criminally negligent manner; or [¶] 4. The defendant aided and abetted coparticipants Mr. Proffer and Mr. Cartwright in a lawful act done in a criminally negligent manner. [¶] 5. During defendant's aiding and abetting coparticipants Mr. Proffer and Mr. Cartwright in the commission of Simple Battery with the risk of death or great bodily injury, or the defendant's aiding and abetting coparticipants Proffer and Cartwright in doing a lawful act with criminal negligence, said coparticipants committed the crime of Involuntary Manslaughter; [¶] AND [¶] 6. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the crime of Involuntary Manslaughter was a natural and probable consequence of the commission of the Simple Battery with risk of death or great bodily injury, or that Involuntary Manslaughter was a natural consequence of a lawful act done in a criminally negligent manner."

⁴ In his reply brief, appellant asserts that the correctness of the instructions as a whole "is not the point. The issue is whether the part identified by appellant was erroneous." The law is plainly otherwise. It is well settled that instructional error is not determined by isolated parts of the instructions or from one particular instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.) Rather, we read the instructions as a whole to determine whether there is a reasonable likelihood that they confused or misled the jury. (*People v. Hughes* (2002) 27 Cal.4th 287, 341.) We also presume that jurors are intelligent and capable of understanding and correlating jury instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

⁵ The jury was instructed as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) In overruling appellant's objection to the instruction, the court reasoned that fleeing "was certainly something that they thought about as a group." The court further noted that all three men had put all of their belongings in appellant's car and concluded, "That in itself might be characterized as an attempt" to flee. The record supports the court's findings. Appellant, by his own admission, packed up, got in his car, and prepared to flee with Proffer and Cartwright. Although they ultimately decided to stay, a reasonable factfinder could have inferred that the physical acts they engaged in prior to that decision were directed at avoiding apprehension and therefore demonstrated a consciousness of guilt. Moreover, any error in giving the instruction was harmless because it "did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it. [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183, fn. omitted.)

D.

Cumulative Error

Appellant contends the cumulative effect of the alleged instructional errors combined to deprive him of a fair trial and due process. Because we reject each claim of error, the contention necessarily fails. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Jac Crawford, Judge

Superior Court County of San Luis Obispo

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